SALE OF REALTY TO KEEPER OF HOUSE OF ILL FAME.

In these days of moral reform legislation and of abolishing segregated districts in our cities questions involving the property rights of those, who have had business dealings with the keepers of such resorts, and who hold evidences of debt given by such keepers, frequently arise. It is with one phase of the law relative to such transactions that it is the purpose of this article to treat; and that phase is the purchase of real property by keepers of houses of ill fame.

Sales of realty to keepers of these resorts are usually made on the installment plan. For instance, the vendor conveys the property by deed of conveyance absolute to the vendee and receives in payment a small cash consideration, the unpaid balance being evidenced by notes or bonds for small amounts, payable monthly and secured by a deed of trust on the property conveyed. In the event that after paying some of these notes or bonds the vendee defaults and the property is sold under the deed of trust, bringing less than the price agreed upon and less than the balance due the vendor under his contract with the vendee, what are the rights of the vendor? By the failure of the vendee to perform his contract must the vendor lose the difference between the price the vendee agreed to pay and the price the property brought at public auction?

Were the vendee not engaged in an illegal and immoral occupation, there would not be the slightest doubt that the vendor could recover the difference between the unpaid contract price and the price brought by the property at public auction. But in what way, if any, does the vendee's nefarious occupation affect the vendor's rights?

Defenses Available to Vendee.

In an action on the evidences of debt by the vendor to recover from the vendee this difference, about the only defense that the vendee could set up, the original sale and the sale under the deed of trust being unimpeachable on any other grounds, would be that the evidences of debt were given for an illegal consideration in that the sale of the realty by the vendor to the

vendee was a sale of property to one, who was engaged in an occupation that was illegal, immoral and against public policy.

Were the property here involved personalty, there would be but little doubt that in the present state of the decisions in this state this defense would be good. Levy *v.* Davis, 115 Va. 841.

But is this rule of law applicable where the property transferred is real estate?

Elements of Illegality in General.

In order to render a contract void for illegality, it must necessarily involve the breach of a statute, or be *contra bonos mores;* and when it may or may not be so, according to circumstances, it will be presumed that it only involves the doing of a lawful but improper act. Illegality is never presumed; but must be proved, or must clearly appear on the face of the contract. Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; Trovinge *v.* McBurney, 5 Cowan, 253; Smith *v.* Du Bose, 6 Am. St. Rep. 260.

Intent.

Moreover, in order to invalidate a contract on the grounds of public policy it must clearly appear on the face of such contract that the agreement itself contemplated the committing of the illegal or immoral acts. It is not sufficient that condemnable acts were done thereunder, if they were not contemplated and provided for by the agreement. Drake *v.* Lauer, 86 N. Y. Supp. 986, affirmed, 182 N. Y. 533, 75 N. E. 1129; Henderson *v.* Virden Coal Co., 78 Ill. App. 437; Callicott *v.* Allen, 31 Ind. App. 561, 67 N. E. 196; Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881, dismissed, 25 S. Ct. 804, 198 U. S. 581, 49 L. ed. 1172.

Mutuality of Intent.

It is also a prerequisite in order to invalidate a contract on the grounds of public policy that the contract be entered into by both parties with the mutual intent and for the express purpose of perpetrating such illegal and immoral acts. Am. & Eng. Encyc. of Law, 986; and cases there cited.

Nor is it sufficient for the vendor to merely have knowledge of

the vendee's intent to use the property for an illegal or immoral purpose; but to render the contract illegal the vendor must in some way actively participate in the commission of such act. Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516; Brunswick *v.* Valleau, 50 Iowa, 120, 32 Am. Rep. 119, and n.; Sprauge *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383; Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520; Hines *v.* Union Savings Bank & Trust Co. (Ga.), 48 S. E. 120.

> "According to the weight of authority, the vendor must in some way actively participate in the illegal purpose of the purchaser in order that such illegality may affect the contract of sale. Mere knowledge on his part that the purchaser intends to make use of the property for some illegal purpose does not taint the contract of sale with illegality. And of course the contract is not affected by any secret intent of the purchaser to use the premises for an unlawful purpose." 39 Cyc. 1215, sec. 2.

Thus we see that in order to render such contracts invalid on these grounds the contracts must

First, involve the breach of a statute, or be *contra bonos mores;*

Second, it must clearly appear on the face of the contract that the agreement itself contemplates the commission of an illegal or immoral act; and

Third, the intent to commit such act must be mutual.

Statutory Regulations.

Sales of realty to keepers of houses of ill fame are neither prohibited nor penalized by any of the statutes of this state, not even by the very stringent law passed by the last Legislature. See Acts, 1916. Nor is the vendor of realty for the very purpose of bawdry criminally liable for such sale. 1 Bishop's New Crim. Law, sec. 1093, citing Ross *v.* Comm. (Ky.), 2 B. Monr. 417

At Common Law.

We must, therefore, look to the Common Law to find out whether or not it is safe for a vendor to sell real property to this class of vendees on time. At Common Law there has been

from time immemorial a radical difference in the treatment of real property from that of personal property; and the safeguards thrown around realty by the Common Law are many. This accounts, no doubt, for the sharp line of cleavage that exists at this day between the law of realty and that of personalty, especially in the law relating to the transfer of title.

The general rule at Common Law is that contracts for the sale of realty are not illegal. There is a dearth of authority on this particular point in this country; but the sound rule of law would seem to be that a sale of realty to a keeper of a house of ill fame is a valid and binding transaction; and is unimpeachable on the grounds of public policy. And it is so held in Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383; and in Armfield *v.* Tate, 29 N. C. 258.

This particular point has never been passed on by the Supreme Court of Appeals of Virginia; and the only case known to the writer that has arisen in this state in which this point has been raised and passed upon in any of the lower courts of this state is the case of Gill *v.* Tinsley, decided in the November Term, 1915, by the Circuit Court of Pittsylvania County, in which Judge E. J. Harvey passed upon this exact point, holding that such a contract was valid and that the plaintiff could recover the balance due him thereunder. In rendering his decision Judge Harvey followed the case of Sprague *v.* Rooney, above cited.

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